Merit Properties Sdn Bhd v Aktif Lifestyle Stores Sdn Bhd (formerly known as Yaohan Sdn Bhd) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–824 OF 1999
DENIS ONG, RICHARD MALANJUM AND AZMEL JJCA
31 MAY 2007

Contract — Guarantee — Construction — Whether conditional — Event which triggered payment — Whether guarantee was on demand

On 24 February 1997, the first respondent as the lessee and the appellant as the lessor entered into a lease agreement in respect of part of a property known as Johor Bharu City Square ('the lease agreement') over part of a shopping centre known as City Square in Johor Bahru commencing from 1 December 1998. Clause 3.1(a) and (b) of the lease agreement required the first respondent to furnish guarantees as security for the due observance and performance by the first respondent of the covenants and conditions in the lease agreement ('the first guarantee), and by way of payment of the rental deposit ('the second guarantee'). In compliance with the lease agreement and upon the request of the first respondent, on 23 April 1997, the second respondent issued the guarantees to the appellant. The guarantees had similar wordings save and except cl 5 of the first guarantee which was subsequently amended by the second respondent's letter dated 5 October 1998 to the appellant. Initially, the effective date of the first guarantee was from 24 February 1997 to 1 September 1998 and remained in force until receipt of payment in cash by the first respondent on the commencement lease, ie, 1 December 1998.

On 26 August 1998, the appellant issued a demand on the first guarantee. However, on 2 September 1998, the respondent refused to pay, stating that the appellant's demand was premature as the commencement date of the lease was not due then, which was 1 December 1998. On 25 September 1998, the first respondent requested an extension of the first guarantee for six months till 3 March 1999, all other terms remained unchanged.

The second respondent by a letter dated 5 October 1998 to the appellant and without prior consent of the first respondent, unilaterally amended cl 5 of the first guarantee by replacing the word 'commencement date' with the words 'Commencement of Fit Out Period as evidenced by written Notice of Commencement of Fit Out'. The second respondent informed the appellant that the first guarantee had at the request of the first respondent been extended to 3 March 1999 and certain amendments were made to cl 5 of the first guarantee in conformity with the original format furnished by the second defendant. Thereafter by a letter dated 5 December 1998, the appellant wrote to the second respondent instructing the second respondent to extend the second guarantee to 1 April 1999. The second respondent never confirmed this. However by a letter dated 28 January 1999, the first respondent wrote to the second respondent confirming that the second guarantee would be renewed subject to a revision of rental which had been agreed upon.

A The first respondent applied to the High Court, inter alia, for declarations that the appellant did not have the right or power to call upon the bank guarantees issued by the second respondent in favour of the appellant and injunctions against the appellant and the second respondent restraining the second respondent from making any payment under the guarantees. The learned High Court judge allowed the first respondent's application. The appellant appealed. The main issue for determination by this court was whether as a matter of construction the guarantees were conditional or unconditional. If the guarantees were ruled to be unconditional, it would give the appellant the right to call upon the guarantees and the second respondent would have to make payments on the first and second guarantees pursuant to the demand made by the appellant.

C The appellant submitted that the guarantees were unconditional since they were issued 'on demand'. The appellant further submitted that the learned High Court judge had erred in finding that the subsequent wording of the guarantees made them conditional. The second respondent supported such contention of the appellant but could not make any payment due to the injunction issued by the High Court. The second respondent was willing to pay only for the first guarantee but not the second guarantee as it had lapsed. However, the first respondent submitted otherwise contending that demand on the guarantees could only be made upon a breach of the condition therein.

E **Held**, allowing the appeal in part in respect of the first guarantee only, ie declaration against the appellant was set aside and the injunction against the second respondent was also set aside. In respect of the second guarantee, the orders made by the High Court against respective parties were affirmed:

F (1) The court was unable to agree with the finding of the learned High Court judge that the guarantees were conditional vide cl 4 of the guarantees. The learned High Court judge erred when he considered extraneous material on the guarantees. Vide letter dated 5 December 1998, the appellant had written to the second respondent of its intention to extend the second guarantee until 1 April 1999. Unfortunately, this was never agreed nor confirmed by the second respondent. However, the first respondent vide a letter dated 28 January 1999, sent a letter to the second respondent confirming that the second guarantee would be renewed subject to a revision of rental which had been agreed upon. Vide letter dated 1 March 1999, the first respondent wrote to the appellant terminating the lease on the ground the appellant had breached the terms therein. In other words, there was no extension of the second guarantee thereby rendering it to be bad and thus lapsed. Indeed the first respondent had unilaterally terminated the lease on 1 March 1999 and such fact was not in dispute. Termination of the lease came earlier than the commencement date of 1 April 1999 (see para 18).

I (2) The first guarantee was 'on demand', thus independent of the lease agreement. All that was required to trigger payment was a demand in writing (see para 19).

(3) The second respondent must honour the 'on demand' guarantees irrespective of the dispute between the first respondent and the appellant and/or the continued existence of the lease agreement. Otherwise, the commercial intent,

character and use of such guarantees would be irreparably prejudiced. The only exception is when fraud is involved. There was no allegation of fraud here (see para 26).

(4) The demand was trigged by the unilateral termination of the lease by the second respondent which caused the appellant to exercise its rights to demand the performance of the guarantees (see para 27).

(5) The issue was whether the second guarantee takes the same position as the first guarantee. Clause 5 of the second guarantee stated that the second guarantee is effective from 24 February 1998 to 1 December 1998 and shall remain in force until receipt of payment in cash by the first respondent on the commencement date of the lease. The commencement date as construed under s 2 of the Second Schedule of the lease agreement means the date of the commencement of the lease set out in s 2 of the Second Schedule (ie, 1 December 1998) or such other date as may be reasonably determined by the lessor. The second guarantee was no longer valid since it expired on 1 December 1998 and was not extended. Immediately after the lease agreement was terminated it entailed the guarantees as non realizable (see para 28).

[Bahasa Malaysia summary

Pada 24 Februari 1997, responden pertama sebagai pamajak dan perayu sebagai pemberi pajak memasuki satu perjanjian pajakan berkenaan dengan sebahagian harta yang dikenali sebagai Johor Bharu City Square ('perjanjian pajakan') ke atas sebahagian pusat membeli belah yang dikenali sebagai City Square di Johor Bahru yang bermula daripada 1 Disember 1998. Klausa 3.1(a) dan (b) perjanjian pajakan memerlukan responden pertama untuk menyediakan gerenti sebagai jaminan bagi pematuhan dan perlaksanaan oleh responden pertama mengenai perjanjian dan syarat di dalam perjanjian pajakan ('gerenti pertama'), dan secara pembayaran deposit sewa ('gerenti kedua'). Pematuhan dengan perjanjian pajakan dan atas permintaan responden pertama, pada 23 April 1997 responden kedua mengeluarkan gerenti-gerenti kepada perayu. Gerenti-gerenti mempunyai susun kata yang sama kecuali klausa 5 gerenti pertama yang kemudiannya dipinda oleh surat responden kedua bertarikh 5 Oktober 1998 kepada perayu. Pada mulanya, tarikh efektif gerenti pertama adalah daripada 24 Februari 1997 hingga 1 September 1998 dan tetap berkuat kuasa sehingga menerima bayaran secara tunai oleh responden pertama pada permulaan pajakan, iaitu 1 Disember 1998.

Pada 26 Ogos 1998, perayu mengeluarkan tuntutan ke atas gerenti pertama. Tetapi pada 2 September 1998, responden enggan untuk membayar, menyatakan bahawa tuntutan perayu adalah pramatang yang mana tarikh bermulanya pajakan belum lewat yang mana adalah 1 Disember 1998. pada 25 September 1998, responden pertama meminta lanjutan atas gerenti pertama untuk enam bulan sehingga 3 Mac 1999, kesemua terma kekal tidak berubah.

Responden kedua melalui surat bertarikh 5 Oktober 1998 kepada perayu dan tanpa kebenaran awal daripada responden pertama, secara satu pihak meminda kalusa 5 perjanjian pajakan dengan menggantikan perkataan 'commencement date' dengan perkataan 'Commencement of Fit Out Period as evidenced by written Notice of

A Commencement of Fit Out'. Responden kedua memberitahu perayu bahawa gerenti pertama telah berdasarkan permintaan responden pertama dilanjutkan hingga 3 Mac 1999 dan beberapa pindaan telah dibuat kepada klausa 5 perjanjian pajakan yang akur dengan format asal yang disediakan oleh defendan kedua. Kemudiannya melalui surat bertarikh 5 Disember 1998, perayu menulis kepada responden kedua
B mengarahkan responden kedua untuk melanjutkan gerenti kedua hingga 1 April 1999. Responden kedua tidak pernah mengesahkannya. Tetapi melalui surat bertarikh 28 Januari 1999, responden pertama menulis kepada responden kedua mengesahkan bahawa gerenti kedua akan diperbaharuai tertakluk kepada semakan sewa yang dipersetujui.

C Responden pertama memohon kepada Mahkamah Tinggi, antara lain, untuk deklarasi-deklarasi bahawa perayu tidak mempunyai hak atau kuasa untuk menuntut jaminan bank yang dikeluarkan oleh responden kedua bagi pihak perayu dan injunksi terhadap perayu dan responden kedua menghalang responden kedua daripada membuat apa-apa bayaran di bawah jaminan. Hakim Mahkamah Tinggi yang bijaksana membenarkan permohonan responden pertama. Perayu telah merayu.
D Isu utama untuk diputuskan oleh mehkamah ini adalah sama ada berkenaan dengan membinaan gerenti-gerenti adalah bersyarat atau tidak bersyarat. Jika gerenti-gerenti diputuskan sebagai tidak bersyarat, ianya memberikan perayu hak untuk menuntut terhadap gerenti-gerenti dan responden kedua perlu membuat bayaran ke atas gerenti pertama dan kedua menurut tuntutan yang dibuat oleh perayu.

E Perayu menghujahkan bahawa gerenti-gerenti adalah tidak bersyarat oleh itu mereka mengeluarkan 'atas tuntutan'. Perayu selanjutnya menghujahkan bahawa hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam dapatannya bahawa susunan perkataan yang berikutnya dalam gerento-gerenti membuatnya bersyarat. Responden kedua menyokong pernyataan perayu tetapi tidak dapat membuat apa-apa bayaran
F disebabkan injunksi yang dikeluarkan oleh Mahkamah Tinggi. Responden kedua bersedia untuk membayar hanya untuk gerenti pertama tetapi bukan gerenti kedua yang mana telah luput. Tetapi, responden pertama menghujahkan sebaliknya menyatakan bahawa tuntutan terhadap gerenti-gerenti hanya boleh dibuat apabila kemungkiran syarat di dalamnya.

G

Diputuskan, membenarkan sebahagian rayuan berkenaan dengan gerenti pertama sahaja, iaitu deklarasi terhadap perayu telah diketepikan dan injunksi terhadap responden kedua juga diketepikan. Berkenaan dengan gerenti kedua, perintah yang
H dibuat oleh Mahkamah Tinggi terhadap pihak-pihak terbabit disahkan:

(1) Mahkamah tidak dapat bersetuju dengan dapatan hakim Mahkamah Tinggi yang bijaksana bahawa gerenti-gerenti adalah bersyarat merujuk kepada klausa 4 gerenti-gerenti. Hakim Mahkamah Tinggi yang bijaksana terlah terkhilaf apabila beliau mempertimbangkan perkara luar terhadap gerenti-gerenti.
I Merujuk kepada surat yang bertarikh 5 Disember 1998, perayu telah menulis kepada responden kedua niatnya untuk melanjutkan gerenti kedua sehingga 1 April 1999. Malangnya, ini tidak pernah dipersetujui atau disahkan oleh responden kedua. Tetapi, responden pertama melalui satu surat bertarikh 28 Januari 1999, telah menghantar surat kepada responden kedua mengesahkan bahawa gerenti kedua akan di perbaharui tertakluk kepada

semakan sewa yang mana telah dipersetujui. Merujuk kepada surat bertarikh 1 Mac 1999, responden pertama menulis kepada perayu menamatkan pajakan atas alas an perayu telah memungkiri syarat-syarat di dalamnya. Dalam erti kata lain, tidak terdapatnya lanjutan gerenti kedua oleh itu menjadikannya tidak dapat diterima dan oleh itu telah luput. Sememangnya responden pertama telah secara satu pihak menamatkan pajakan pada 1 Mac 1999 dan fakta tersebut tidak dinafikan. Penamatan pajakan hadir terlebih dahulu daripada tarikh permulaan 1 April 1999 (lihat perenggan 18).

(2) Gerenti pertama adalah 'atas tuntutan', oleh itu tidak bergantung kepada perjanjian pajakan. Kesemuanya diperlukan untuk mencetuskan pembayaran adalah tuntutan secara bertulis (lihat perenggan 19).

(3) Responden kedua mestilah menghormati gerenti-gerenti 'atas tuntutan' tanpa mengira pertikaian antara responden pertama dan perayu dan/atau kewujudan yang berterusan perjanjian pajakan. Jika tidak, tujuan komersial, sifat dan penggunaan gerenti-gerenti tersebut akan menjadi prejudis yang tidak dapat diperbaiki. Pengecualian hanya apabila melibatkan penipuan. Tidak terdapatnya dakwaan penipuan di sini. (lihat perenggan 26).

(4) Tuntutan dicetuskan oleh penamatan pajakan secara satu pihak oleh responden kedua yang menyebabkan perayu menggunakan haknya untuk menuntut pelaksanaan jaminan tersebut (lihat perenggan 27).

(5) Isu sama ada gerenti kedua mengambil posisi yang sama seperti gerenti pertama. Klausa 5 gerenti kedua menyatakan bahawa gerenti kedua adalah berkuatkuasa daripada 24 Februari 1998 hingga 1 Disember 1998 dan kekal berkuat kuasa sehingga penerimaan pembayaran secara tunai oleh responden pertama pada tarikh bermulanya pajakan. Tarikh permulaan seperti mana yang dinyatakan di bawah s 2 Jadual Kedua perjanjian pajakan bermaksud tarikh bermulanya pajakan yang dinyatakan di dalam s 2 Jadual Kedua (iaitu, 1 Disember 1998) atau tarikh lain yang munasabah ditetapkan oleh pemberi pajak. Gerenti kedua tidak lagi sah apabila ianya telah luput pada 1 Disember 1998 dan tidak dilanjutkan. Sebaik sahaja selepas perjanjian pajakan ditamatkan ianya memerlukan jaminan yang mana tidak boleh direalisasikan (lihat perenggan 28).]

Notes

For cases on construction, see 3(2) *Mallal's Digest* (4th Ed, 2002 Reissue) paras 3388–3405.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd [1996] 2 MLJ 517 (refd)
Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (refd)
Government of Malaysia v South East Asia Insurance Bhd [2003] 3 MLJ 625 (refd)

Appeal from: Originating Summons No D7–24–90 of 1999 (High Court, Kuala Lumpur)

A

CS Kumar (Sri Ram & Co) for the appellant.

Dennis Appaduray (Wong Rhen Yen with him) (Dennis Nik & Wong) for the first respondent.

Uma Devi (SH Teh with her) (Teh & Azlina) for the second respondent.

B

Richard Malanjum JCA (now CJ Sabah & Sarawak) (delivering judgment of the court):

INTRODUCTION

C

[1] This is an appeal from the appellant dissatisfied with the High Court decision allowing with costs the first respondent's application vide the originating summons dated 15 March 1999 for declaratory relief and injunction.

D

[2] The first respondent's application before the High Court was, inter alia, for declarations that the appellant does not have the right or power to call upon bank guarantees No 70068701146 as 'Fit Out Deposit' for RM190,096 ('the first guarantee) and No 70068701153 for RM570,290.70 as 'Rental Deposit' ('the second guarantee'), both (collectively referred to as 'the said guarantees'), both issued by the second respondent in favour of the appellant and injunctions against the appellant and the second respondent restraining the second respondent from making any payment under the said guarantees.

E

BRIEF FACTS OF CASE

F

[3] On 24 February 1997, the first respondent as the lessee and the appellant as the lessor entered into a lease agreement in respect of part of a property known as Johor Bharu City Square ('the lease agreement') over part of a shopping centre known as City Square in Johor Bahru commencing from 1 December 1998.

G

[4] Clause 3.1(a) and (b) of the lease agreement required the first respondent to furnish the said guarantees as security for the due observance and performance by the first respondent of the covenants and conditions in the lease agreement, and by way of payment of the rental deposit.

H

[5] In compliance with the lease agreement and upon the request of the first respondent, on 23 April 1997, the second respondent issued the said guarantees to the appellant.

I

[6] The said guarantees had similar wordings save and except cl 5 of the first guarantee was subsequently amended by the second respondent's letter dated 5 October 1998 to the appellant. Initially, the effective date of the first guarantee was from 24 February 1997 to 1 September 1998 and remained in force until receipt of payment in cash by the first respondent on the commencement lease, ie, 1 December 1998.

[7] On 26 August 1998, the appellant issued a demand on the first guarantee. However, on 2 September 1998, the respondent refused to pay, stating that the appellant's demand was premature as the commencement date of the lease was not due then, which was 1 December 1998. **A**

[8] On 25 September 1998, the first respondent requested an extension of the first guarantee for six months till 3 March 1999, all other terms remained unchanged. **B**

[9] The second respondent by a letter dated 5 October 1998 to the appellant and without prior consent of the first respondent, unilaterally amended cl 5 of the first guarantee by replacing the word 'commencement date' with the words 'Commencement of Fit Out Period as evidenced by written Notice of Commencement of Fit Out.' The second respondent informed the appellant that the first guarantee had at the request of the first respondent been extended to 3 March 1999 and certain amendments were made to cl 5 of the first guarantee in conformity with the original format furnished by the second defendant. **C** **D**

[10] Thereafter by a letter dated 5 December 1998, the appellant wrote to the second respondent instructing the second respondent to extend the second guarantee to the 1 April 1999. The second respondent never confirmed this. However by a letter dated 28 January 1999, the first respondent wrote to the second respondent confirming that the second guarantee would be renewed subject to a revision of rental which had been agreed upon. **E**

AT THE HIGH COURT

[11] After considering the submissions of learned counsel for both parties and the clauses of the lease agreement and the said guarantees, the learned High Court judge ruled that the said guarantees were absolute, unconditional and irrevocable during their term, but cl 4 of the said guarantees made them conditional in that the lessor had the right to call upon the bank to release the sums in the said guarantees only 'if the lessee shall make default in the performance or observance of any of the terms and/or provisions contained in the said lease'. The manner in which the said guarantees were framed did not intend to provide for a situation where there would be no Commencement of the Fit-Out period and consequentially the said lease would not commence. **F** **G**

[12] Accordingly the learned High Court judge allowed the first respondent's application ie, a declaration that the appellant or its agent did not have the right or power to make any call or claim upon first and second Bank guarantees issued by the second respondent, and consequently an injunction was thus granted restraining the bank from making payment under the said guarantees. **H** **I**

BEFORE THE COURT OF APPEAL

[13] At the conclusion of the appeal to the Court of Appeal, we allowed the appeal in part in respect of the first guarantee only ie, declaration against the appellant is set

aside and the injunction against second respondent is also set aside. In respect of the second guarantee, the orders made by the High Court against respective parties are affirmed. There is now a pending appeal to the Federal Court. We now give our grounds of judgment.

[14] The main issue for determination by this court is whether the said guarantees are conditional or unconditional. It is a matter of construction. If the said guarantees are ruled to be unconditional, it would give the appellant the right to call upon the said guarantees and the second respondent would have to make payments on the first and second guarantees pursuant to the demand made by the appellant.

[15] The appellant submitted that the said guarantees were unconditional since they were issued 'on demand'. The appellant further submitted that the learned High Court judge had erred in finding that the subsequent wording of the guarantees made them conditional. The second respondent supported such contention of the appellant but could not make any payment due to the injunction issued by the High Court. The second respondent was willing to pay only for the first guarantee but not the second guarantee as it had lapsed.

[16] However, the first respondent submitted otherwise contending that demand on the said guarantees could only be made upon a breach of the condition therein.

FINDINGS OF THIS COURT

The first guarantee

[17] The said guarantees were intended to secure performance of the Lease. The first guarantee was valid from 24 February 1997 to the 3 March 1999 and remained in force until the lessee paid to the lessor the sum of RM190,096.90 on the Commencement of the Fit Out Period. In an event of early termination, prior to the commencement date of the lease, the lessor would be entitled to forfeit all deposits paid by the lessee. This is clearly specified in the cl 7.9 of the lease agreement which reads:

> 7.9 UNILATERAL DETERMINATION OF LEASE
>
> (i) In the event of the lessee terminating the lease prior to the commencement date of the lease, the lessor shall be entitled to forfeit all deposits paid by the lessee to the lessor pursuant to Article III without prejudice to any right of action of the lessor against the lessee for any other loss or damages suffered or sustained by the lessor.

[18] We are unable to agree with the finding of learned High Court judge that the said guarantees are conditional vide cl 4 of the said guarantees. The learned High Court judge erred when he considered extraneous material on the said guarantees. Vide letter dated 5 December 1998, the appellant had written to the second respondent of its intention to extend the second guarantee until 1 April 1999. Unfortunately, this was never agreed nor confirmed by the second respondent. However, the first respondent vide a letter dated 28 January 1999, sent a letter to the second respondent confirming that the second guarantee would be renewed subject

to a revision of rental which had been agreed upon. Vide letter dated 1 March 1999 exh 'CLY–8', the first respondent wrote to the appellant terminating the lease on the ground the appellant had breach the terms therein. In other words, there was no extension of the second guarantee thereby rendering it to be bad and thus lapsed. Indeed the first respondent had unilaterally terminated the lease on 1 March 1999 and such fact was not in dispute. Termination of the lease came earlier than the commencement date of 1 April 1999.

Whether the first guarantee was unconditional

[19] The first guarantee was 'on demand', thus independent of the lease agreement. All that is required to trigger payment is a demand in writing.

[20] In dealing with the interpretation of the words 'conditional' and 'unconditional', Mohamed Dzaiddin FCJ (as he then was) in *Government of Malaysia v South East Asia Insurance Bhd* [2003] 3 MLJ 625; referred to *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517 which affirmed that there are two types of bond. The first is a conditional bond whereby a guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The second is an unconditional or 'on demand' bond where a guarantor beneficiary need not prove any default in performance of the principal contract.

[21] In *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, the then Supreme Court ruled 'the performance bond was, on a true construction, a pure 'on demand' guarantee, and all that was required to trigger them was a demand in writing. It would not be dependent or conditional on the production of the document, eg a certificate from some nominated independent person like an architect as in some building contracts, etc. Neither was it worded to make it conditional for Bank Bumiputra, the issuer of the performance bond, to inquire into the existence or otherwise of any breach of any contractual obligation between the beneficiary of the bond, ie the buyer in this case, and the seller; at the behest of the latter itself, the performance bond was issued. It was not even worded to make it conditional on a simple declaration by the beneficiary, without proof to its issuer, that the seller had not paid damages to the buyer after the release by the buyer of the sum of RM466,562. In fact, the present performance bond, had it been worded, eg, to require any proof of breach by the buyer so as to deserve any payment, then, in such event, its commercial acceptability as a performance bond, would be mostly lost.

> Dealing further with the construction of the performance bond, since we found it was on demand performance bond, this would, in our view, make the present performance bonds independent of any underlying contract, ie, any contract between the buyer and the seller. We thought, therefore, it was not open to His Lordship in the court below to impart into this on demand guarantee, by implication, a requirement to have regard to, or to inquire into any breach of any obligation of such underlying contract, and this seemed to have been done. *The next and only other question from the instant performance bonds would be as to what sort of demand it would be as required by its wording*. (Emphasis added.)

A **[22]** Premised on the foregoing principle formulated by the above case, it is necessary to peruse the relevant parts of the said guarantees. The issue in the present appeal is whether the said guarantees are conditional or 'on demand' guarantee. The manner the said guarantees were worded so as to be self-evident.

B **[23]** Clause 3 states '…irrevocably and unconditionally…upon first demand … undertake to make payments.'

C **[24]** Clause 4 state '… the lessor shall have the right to call upon the Bank by notice in writing to release the total sum due and owing …and it shall not be necessary or required in order to maintain and enforce the bank's liability … *that the demand shall be made on the lessee … and the Bank shall be under no obligation to determine the nature of the breach nor the amount owing under the said lease and shall accept as correct with regard thereto …*' (Emphasis added.)

D **[25]** Again the word 'unconditionally' is found in cl 6(a) and (b) of the said guarantees thereby providing the burden imposed on the second respondent which:

> '*…shall be absolute and unconditional* irrespective of any change or waiver or departure from the terms of the said lease or any other circumstance which might otherwise constitute a defence available to, or a discharge of, the lessee in respect with its obligations or the Bank's obligation under this guarantee... shall not be revocable … and shall not be discharged by … or any other disability or impediment against enforcement of liability of the lessee which shall nowise impair or effect the Bank's liability and obligation hereunder'.

E

F **[26]** The second respondent must honour the 'on demand' guarantees irrespective of the dispute between the first respondent and the appellant and/or the continued existence of the lease agreement. Otherwise, the commercial intent, character and use of such guarantees would be irreparably prejudiced. The only exception is when fraud is involved. There is no allegation of fraud here.

What triggered the demand?

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[27] The obvious answer to the question posed is the unilateral termination of the lease by the second respondent which caused the appellant to exercise its rights to demand the performance of the said guarantees as contained in exh 'CLY–9'.

H *Second guarantee*

[28] The issue is whether the second guarantee takes the same position as the first guarantee. Clause 5 of the second guarantee states that the second guarantee is effective from 24 February 1998 to 1 December 1998 and shall remain in force until receipt of payment in cash by the first respondent on the commencement date of the said lease. The commencement date as construed under s 2 of the second schedule of the lease agreement means 'the date of the commencement of the lease set out in s 2 of the second schedule (ie, 1 December 1998) or such other date as may be reasonably determined by the lessor. The second guarantee was no longer valid since

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it expired on 1 December 1998 and was not extended. Immediately after the lease agreement was terminated it entails the guarantees as non realizable.

CONCLUSION

[29] For the above reasons we allow the appeal in part in respect of the first guarantee only ie, declaration against the appellant is set aside and the injunction against second respondent is also set aside. In respect of the second guarantee, the orders made by the High Court against respective parties are affirmed. Costs to appellant to be taxed here and below and deposit paid to be refunded to appellant.

Appeal allowed.

Reported by Loo Lai Mee